# The unconfined power of European Union law

ARTICLES

# THE UNCONFINED POWER OF EUROPEAN UNION LAW

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ABSTRACT: Certain features condition when most EU law comes into being. EU laws must compete with other laws for authority. They form part of legal regimes which are partial in scope and can cut across national legal regimes. They justify themselves by reference to a vision of political community which values what individuals do together more than simply their living together. These features act as a source of conflict in two ways. They, first, endow EU law with certain qualities which act as a source of stress. These include over-responsibilisation, destabilisation and functionalism. Secondly, the concern to secure authority by legislating better to realise certain shared activities leads to expertise heavily influencing both the content and incidence of EU law and to a disregard of those activities which link daily life experiences to wider processes of identity formation. The failure to address these features is central to the malaise and antipathy currently confronting the European Union.

KEYWORDS: power of EU law – conflicts and EU law – public opinion – culture and EU law – expertise and EU law – solidarity.

## I. INTRODUCTION

EU law has never been so challenged. There has been the referendum vote in the United Kingdom. Hungary will be holding a referendum on whether to accept the mandato-

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ry relocation of asylum seekers.[1] France has stated that if the EU fails to amend Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (Posted Workers Directive) it will simply disobey it.[2] Italy is threatening to ignore EU laws on bank bail-outs.[3] Formal sanctions procedures against Spain and Portugal for running excessive deficits are being withdrawn because of 'political sensitivities'.[4] If much of this defiance is against measures seen by national leaders as politically costly, permission is taken for it because of a wider environment in which, since 2006, positive visions of the EU have fallen by about one third and negative ones increased by over one half.[5] If some believe this to have been provoked by the crises of the last few years, others see the continual intrusions of the EU into the minutiae of everyday lives as the cause. Future strategies reflect this uncertain diagnosis.[6] One view is that the EU should tinker less and prioritise large-scale projects.[7] Another is that it should intervene to make citizens' lives tangibly better.[8] These views make assumptions about the malaise upon which assertions about what should be done are built. For no regard is had to how its subjects experience EU power. This is in large part because none engage with the dominant instrument for the expression of that power, EU law, whose institutionalisation and communication of that power is central to its experience.

Three structures central to the development of EU law have been pivotal to this experience. EU law needs, first, to offer better solutions than other arenas. Having to rely on its subjects to realise these, this leads to its imposing intensive and extensive responsibilities on them. Secondly, its partial scope and reliance on domestic laws and institutional machinery for its application and enforcement lead both to a sense of ob-

[1] *Hungary to Have October Referendum on EU Migrant Plan*, in *BBC News, Europe*, 5 July 2016, www.bbc.com. Opinion polls show a strong opposition to the measures in Hungary. On the measures see Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece; European Commission Proposal for a Regulation establishing a Union Resettlement Framework and Amending Regulation 516/2014, COM (2016) 468.

[2] EurActiv.com with Reuters, *France Threatens to Stop Applying EU Law on Posted Workers*, in *EurActiv.com, News,* 4 July 2016, www.euractiv.com. This has pushed a Commission rethink, www.ft.com.

[3] T. DURDEN, *"We Won't Be Lectured" – Italy's Renzi To Defy Brussels Over Banking Bailout*, in *Zero Hedge*, 3 July 2016, www.zerohedge.com.

[4] *Brussels Drops Fines Against Spain and Portugal for Fiscal Breaches'*, in *Financial Times*, 27 July 2016, www.ft.com.

[5] European Commission, *Public Opinion in the European Union: Autumn 2015*, in *Standard Eurobarometer 84*, 2015, p. 6.

[6] *EU Has Interfered Too Much in People's Lives, Juncker Says Ahead of Brexit Vote*, in *Reuters, World*, 19 April 2016, www.reuters.com; J.M. FERRY, *En Europe, "une souveraineté partagée plutôt que le fédéralisme"*, in *Le Monde*, 27 June 2016, www.lemonde.fr.

[7] J. BARROSO, *We Are Determined to Make EU Laws More Business-friendly*, in *Telegraph*, 24 October 2013, www.telegraph.co.uk.

[8] German Government Statement on Brexit, *Our Historical Responsibility for the EU*, 28 June 2016, www.bundeskanzlerin.de.

scurity about what it does and instability insofar as it cuts across and unsettles domestic regimes. Finally, EU law sees well-being and enrichment as secured exclusively through participation in shared or common activities. It neglects other visions of community which see well-being and self-realised secured through mere co-presence. This focus on worth being tied to what one does, rather than who one is, generates a very alienating vision marked by a limited moral vocabulary and a tendency towards functionalism and utilitarianism.

This EU legal power is unconfined because neither the EU nor domestic judiciaries have addressed these qualities of EU law. This lack of constraint results in these qualities shaping many of the conflicts about the exercise of EU power. EU legislative intervention has centred on responding to technological or economic developments as these provide the greatest opportunity to further its claims to legislate better than others and the greatest threats to these claims. This results in a central cleavage in the EU being between experts and non-experts as the former are granted a privileged place in EU law in setting out what better law-making involves here. This worldview, when institutionalised into EU law and combined with the latter's opaque and destabilising features, has a propensity to generate conflict where it destabilises identities which link daily activities, roles and status to wider notions of social or national boundary setting. For, quite simply, it takes no account of these. These acquire an edge in an EU context that they would not otherwise, partly because EU law's foreign-ness accentuates the link between the daily activity and ideas of national identity and partly because, it will be argued, EU law's alienating qualities result in its disrupting the relationship with the past and the climates of personal tolerance created by these identities in a particularly aggressive way. This leads to equally unconfined domestic responses where the idea of Europe is now strongly associated with an unpleasant cultural politics in which a collective freedom, in which the smallest activities are tied to wider notions of society and the nation, is to be defended from a EU which is the enemy of that freedom.

The iconography of these conflicts adds another layer to how EU law is experienced. In addition to the general experiences of over-responsibilisation, disorientation and alienation, EU law become associated with a labile continuum in which treasured identities can become too easily suffused within a reactionary cultural politics and polarisation between those who value the insights of expertise and those who treasure more those of cognition. If opportunist politicians bear some responsibility for exploiting this mix, the unconfined nature of EU legal power and the EU's failure to create suitable institutional arenas for its contestation have provided the context and trigger for this contamination of public life across Europe.

## II. The three puzzles of EU contestation

A plausible explanation for the crisis of authority facing the EU is over-reach. The President of the European Council, Donald Tusk, alluded to this in a speech on 1 June 2016,

when he stated that "forcing lyrical and in fact naïve Euro-enthusiastic visions of total integration [...] is not a suitable answer to our problems".[9] If he was referring to future overreach, for some the EU passed this point a while ago. It now governs core State policies many of which are the bread and butter of national elections. Its lack of authority to do this creates a double whammy of decline in support for it, which, in turn limits its capacity to take effective policy measures.[10] There is, to be sure, much in this argument but it does not fit with the two negative associations most commonly held by citizens about the EU. These are that it has no clear message (held by 78 per cent of citizens) and that it involves too much bureaucracy (shared by 71 per cent of citizens). The EU is more widely associated with these than austerity, for example (held by 61 per cent).[11] These qualities attach to all EU activities rather than simply those where it strayed into fields that it arguably should not have. Scratch further and three puzzles emerge about the contestation which takes place surrounding the EU.

The first goes to the incidence of this contestation. It is unpredictable as to where it takes place. It takes place, of course, in politically salient fields such as migration, bioethics or budgetary politics. However, it is equally likely that contestation takes place around seemingly arcane or technical matters. In the second half of 2014, for example, there was considerable political debate in the United Kingdom about EU law extending compulsory motor insurance to vehicles used on private land,[12] EU legislative proposals on oven and kitchen gloves,[13] and the Commission considering phasing out of halogen

[9] Speech by President Donald Tusk at the European Business Summit of 1 June 2016, in European Council Press Release 307/16 of 1 June 2016, www.consilium.europa.eu.

[10] For examples of this thesis see G. MAJONE, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?*, Cambridge: Cambridge University Press, 2014, Chs 4 and 5; P. GENSCHEL, M. JACHTENFUCHS, *More Integration, Less Federation: the European Integration of Core State Powers*, in *Journal of European Public Policy*, 2016, p. 42 *et seq*.

[11] These shares are relatively consistent. These particular figures are taken from European Commission, *Public Opinion in the European Union: Spring 2015,* in *Standard Eurobarometer 83*, 2015, p. 118.

[12] Court of Justice, judgment of 4 September 2014, case C-162/13, *Damijan Vnuk*. A source close to the British Transport Minister stated "[...] this is exactly the sort of bureaucratic EU meddling that drives people mad. We're determined to fight it off. It simply isn't necessary and could hit Brits in their pockets". See B. CARLIN, *Now Brussels Threatens to Slap Car Insurance on Your Lawnmower*, in *Daily Mail*, 2 August 2014, www.dailymail.co.uk. For other press coverage see N. COLLINS, C. HOPE, *Gardeners with Sit-on Lawnmowers Face Buying Motor Insurance*, in *Telegraph*, 3 August 2014, www.telegraph.co.uk; J. NORTON, *Insure Your Lawnmower*, in *Daily Mail*, 25 February 2015, www.dailymail.co.uk; *Lawnmowers and Buggies need Insurance rules EU*, in *The Times*, 25 February 2015, www.thetimes.co.uk; *Now 'Ridiculous' EU Calls for ALL Vehicles to Be Insured Even Lawnmowers and Golf Buggies*, in *Daily Express*, 25 February 2015.

[13] European Commission Proposal for a Regulation on Personal Protective Equipment, COM (2014) 186. The British Business Minister stated that "this EU power grab for our kitchen sinks is completely bonkers". See P. DOMINICZAK, *Price of Oven Glows and Marigolds to Rise Because of 'Bonkers' EU,* in *The Telegraph*, 23 November 2014, www.telegraph.co.uk. Press reaction included J. PALMER, *Eurocrats to Regulate our Marigolds? We Have to Combat these EU Fantasies*, in *The Guardian*, 24 November 2014, www.theguardian.com; T. GOODENOUGH, *Bonkers' EU Could Cause Marigolds and Oven Glove Price Hike*, in *The*

bulbs.[14] All this cannot be put down to the exceptional salaciousness of the British press. Similar reporting is present in a number of EU States, notably the Netherlands,[15] Czech Republic, Austria, Denmark, Ireland and Sweden.[16] Nor can be it put down some peculiarly British thin skin about Brussels intrusion. The belief that the EU encroaches excessively on life style regulation is reportedly also held by the German government.[17] Just as mysterious, however, is when contestation does not occur. A judgment in November 2014 that overtime pay was to be included in the calculation of holiday pay made almost as big news. Its financial implications were more significant than the other EU controversies mentioned.[18] It was also based on an extensive interpretation of the Working Time Directive, the EU instrument which has been most often questioned.[19] However, for all this heat, its EU dimension was simply neither debated nor contested.

The second goes to the drivers of this contestation. A rich seam of literature has suggested three drivers are dominant in shaping public opinion about the EU.[20] One goes to whether individuals or States benefitted materially from what the EU does.[21]

*Sun*, 25 November 2014, www.thesun.co.uk; T. COHEN, *Price of Marigolds Set to Soar… Because of 'Bonkers' EU Rules to Make Them 'Washing-up Proof'*, in *Daily Mail,* 23 November 2014, www.dailymail.co.uk.

[14] It was required to review to this end Commission Regulation (EC) 244/2009 of 18 March 2009 implementing Directive 2005/32/EC of the European Parliament and of the Council with regard to ecodesign requirements for non-directional household lamps, Preamble, alinea 21 and Art. 7. J. DELINGPOLE, *Why the EU's Plan to Ban Halogen Light Bulbs Should Make You Blow a Fuse*, in *Daily Mail*, 2 March 2015; L. WINCHESTER, *Now EU Targets Halogen Bulbs: Brussels Could Ban Light Used by Millions by Next Year*, in *Daily Express*, 2 March 2015, www.express.co.uk; N. BARTLETT, *EU Could Ban Halogen Bulbs as Early as Next Year as Part of Energy-saving Drive*, in *Daily Mirror*, 2 March 2015, www.mirror.co.uk. For a contrary account, A. NESLEN, *LED Lighting Surge Dimmed by Halogen Lamp Reprieve in Brussels*, in *The Guardian*, 25 November 2014, www.theguardian.com.

[15] Brusselse bezoimucht (Brussels meddling) is a favorite phrase of the Dutch press. For an example see *Brussel, Handen af van de e-sigaret*, in *De Dagelijkse Standaard*, 27 September 2013, www.dagelijksestandaard.nl.

[16] C. DE VREESE, *A Spiral of Euroscepticism: The Media's Fault?*, in *Acta Politica*, 2007, p. 271.

[17] N. WATT, *Angela Merkel Ready to Offer Britain Limited EU Opt-outs*, in *The Guardian*, 25 February 2014, www.theguardian.com.

[18] Employment Appeal Tribunal, judgment of 4 November 2014, *Bear Scotland v. Fulton*. A task force has been established to examine the implications, R. NEATE, *Coalition Seeks to Limit Impact of Holiday Back-pay Ruling*, in *The Guardian*, 4 November 2014, www.theguardian.com. The EEF was reported as estimating that it would put 3 per cent on manufacturers' payroll costs, K. HOPE, *Holliday Pay Ruling: Who is Affected?*, in *BBC News*, 4 November 2014, www.bbc.co.uk.

[19] The relevant provision was Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Art. 7. There was also a CJEU judgment covering this situation which the EAT largely followed, see Court of Justice, judgment of 22 May 2014, case C-539/12, *Lock*.

[20] An excellent survey is provided in S. HOBOLT, C. DE VRIES, *Public Support and European Integration*, in *Annual Review of Political Science*, 2016, p. 413.

[21] M. GABEL, *Public Support for European Integration. An Empirical Test of Five Theories*, in *Journal of Politics*, 1998, p. 333; J. TUCKER, A. PACEK, A. BERINSKY**,** *Transitional Winners and Losers: Attitudes Toward EU Membership in Post-communist Countries*, in *American Journal of Political Science*, 2002, p. 557.

Another goes to whether the EU reinforces or destabilises individual and collective identities: be it nationals narratives,[22] relationships to the wider world,[23] and or individuals' own relationships with more individualistic and less trusting dispositions tending to be less sympathetic to European integration.[24] The final narrative argues that public opinion is shaped by how questions were framed by domestic political elites and the cues provided to the wider citizenry as to whether EU policies and laws are beneficial or not.[25] The balance between these will vary and different authors emphasise one more than the other. However, nobody suggests public opinion at a general level is significantly driven by anything else. However, none of these drivers appear particularly determinative when we consider the examples of contestation earlier. To be sure, some may have been driven by a British minister faced with the threat of defeat who then tipped the media, but many did not involve this. This was certainly not the case in *Vnuk*, for example, where the ministerial response was made in reaction to British press uproar. Furthermore, in all instances, these very plausible general explanations seem to fade away into the background when we look at the texture and detail of any dispute.

The third puzzle goes to the significance of this contestation, both in terms of what it signifies and whether it matters. Does a law on halogen lamps imply a law on halogen lamps whether its designation is that of a national statute or an EU Directive? It is very difficult to argue this as when citizens argue about a proposed EU measure on this, they are also discussing the wider relations, symbols and associations represented by it. If that were not the case, citizens would not focus on the provenance on an EU measure. Yet what is represented by this EU association and does it matter? Politicians clearly think it matters. As when they choose to take on the Union's "bossiness",[26] its excessive

[22] J. Diez Medrano, *Framing Europe: Attitudes to European Integration in Germany, Spain, and the United Kingdom*, Princeton, Oxford: Princeton University Press, 2003, Chs 3 and 9; A. Menéndez Alarcón, *The Cultural Realm of European Integration: Social Representations in France, Spain, and the United Kingdom*, Westport, Conn: Praeger Publishers, 2004; C. Kentmen, *Determinants of Support for EU Membership in Turkey: Islamic Attachments, Utilitarian Considerations and National Identity*, in *European Union Politics*, 2008, p. 487.

[23] S. Carey, *Undivided Loyalties. Is National Identity an Obstacle to European Integration?*, in *European Union Politics*, 2002, p. 387; A. Luedtke, *European Integration, Public Opinion and Immigration Policy: Testing the Impact of National Identity*, in *European Union Politics*, 2005, p. 83.

[24] S. Duchesne, A.-P. Frognier, *National and European Identifications: A Dual Relationship*, in *Comparative European Politics*, 2008, p. 143; E. Harteveld, T. van der Meer, C. de Vries, *In Europe We Trust? Exploring Three Logics of Trust in the European Union*, in *European Union Politics*, 2013, p. 542.

[25] L. Hooghe, G. Marks, *Calculation, Community and Cues. Public Opinion on European Integration*, in *European Union Politics*, 2005, p. 419; M. Steenbergen, E. Edwards, C. de Vries, *Who's Cueing Whom?*, in *European Union Politics*, 2007, p. 13; S. Hobolt, J Wittrock, *The Second-order Election Model Revisited*, in *Electoral Studies*, 2011, p. 29.

[26] P. Walker, *David Cameron: Beating Heart of Britain Wants Less EU Interference*, in *The Guardian,* 14 January 2013, www.theguardian.com.

intrusion in domestic affairs,[27] its "life style regulation"[28] or its burdensomeness,[29] they see, however, something politically significant which affects the lives of their citizens which they wish to address. Academics have (unsurprisingly) associated the EU with a number of phenomena. Some, for example, associate it with the realisation of a European ideal which combats atavistic national behaviour;[30] develops citizen sensibilities;[31] protects excluded and marginalised interests[32] or provokes a re-imagination of our political horizons.[33] Another interesting association is with the rise of post-material politics in which there is a move away from protection of material interests to advocacy of non-material concerns, such as ecology, development, the internet, or consumerism.[34] Such a world is dominated by a politics of risk and regulation whereby actors have to anticipate the negative effects of the actions of others with a division between those who create risks and those anxious about bearing the consequences of these risks and about their status and security within a disorienting world.[35]

None of these associations correspond with how EU citizens experience the significance of EU law. If they did, one would expect EU law to be identified with a clear *ethos* or belief-system which would be at the heart of any contestation. However, as mentioned earlier, obscurity about what the EU is about is the second most widely held association after bureaucratic intrusion.[36] This absence is furthermore keenly felt relative to the domestic political or legal space. Citizens, thus, are often de-anchored when confronted by EU measures or institutions and, thus, look for substitutes to inform their

[27] These were the comments of the Dutch Prime Minister, Mark de Rutte, in an interview on 18 May 2014, see nieuwsuur.nl.

[28] N. WATT, *Angela Merkel Ready to Offer Britain Limited EU Opt-outs*, cit.

[29] J. KATAINEN, L. ENRICO, *Die EU-Rechtsetzung Vereinfachen*, in *Frankfurter Allgemeine Zeitung*, 18 October 2013.

[30] J. WEILER, *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999, especially pp. 332-348.

[31] A. SOMEK, *Europe: Political, Not Cosmopolitan*, in *European Law Journal*, 2014, p. 142.

[32] M. POIARES MADURO, *We, the Court: The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing, 1998, pp. 166-174; C. JOERGES, *Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form*, in *LEQS Working Paper 28*, 2010.

[33] J. KRISTEVA, *Europhilia, Europhoria*, in *Constellations*, 1998, pp. 321, 327; J. KRISTEVA, *The Crisis of the European Subject*, New York: Other Press, 2000, Ch. 3; R. GASCHÉ, *Europe, or the Infinite Task: A Study of a Philosophical Concept*, Stanford: Stanford University Press, 2009, p. 342.

[34] R. INGLEHART, *The Silent Revolution Changing Values and Political Styles Among Western Publics*, Princeton: Princeton University Press, 1977; R. INGLEHART, S. FLANAGAN, *Value Change in Industrial Societies*, in *American Political Science Review*, 1987, p. 1289.

[35] On this theme within a Europeanised context see U. BECK, C. CRONIN, *The European Crisis in the Context of Cosmopolitization*, in *New Literary History*, 2012, p. 641; U. BECK, D. LEVY, *Cosmopolitanized Nations: Reimagining Collectivity in World Risk Society*, in *Theory, Culture and Society*, 2013, p. 3.

[36] European Commission, *Public Opinion in the European Union: Spring 2015*, cit.

views: be these narratives provided by domestic decision-makers[37] or national equivalents.[38] This obscured *ethos* is startling as ideology permeates the EU political institutions. Decision-makers have been found to vote predominantly along left wing/right wing lines in EU institutions[39] and citizens vote for representatives within these institutions along the same lines.[40]

## III. The three dimensions of EU legal power

Research, such as the above, on EU public opinion has ensured that EU studies are not simply about bureaucracy and institutional interplay. It locates the law and institutional settlement of the EU against a more detailed wider environment than any other research. In so doing, it relativizes the power and authority of EU law and institutions by providing some measure of how their subjects view them. This is all path-breaking. It tells only half the story, however, as it does not gauge how EU law's subjects experience its power. This is in large part because EU law is simply an instrument to realise EU policies with few independent qualities of its own. Subjects' views of EU's policies and EU law are thus treated synonymously.

EU law cannot, however, be reduced in this way. It has been deployed as the central vehicle through which EU power has been traditionally realised because it has certain qualities of its own that are seen as more valuable than other alternatives. Traditional accounts would, therefore, point to these as law's power to stabilise expectations, command authority, institutionalise certain values, resolve differences, and communicate collective decisions to all parts of society. However, to do all these things, EU law must have a certain capacity, a particular power. For this essay, the qualities of this power are of particular interest. It enables the EU to do things in a particular way – otherwise EU law would not be used – but it can also have qualities which are both objects of contestation in their own right, and, equally importantly, go to how EU policies are experienced.

There are three dimensions to EU law's power.[41]

[37] L. Hooghe, G. Marks, *Calculation, Community and Cues*, cit.; M. Steenbergen, E. Edwards, C. de Vries, *Who's Cueing Whom?*, cit.; S. Hobolt, J. Wittrock, *The Second-order Election Model Revisited*, cit.

[38] M. Ellenbaas *et al.*, *The Impact of Information Acquisition on EU Performance Judgments*, in *European Journal of Political Research*, 2012, p. 728.

[39] S. Hix, A. Noury, G. Roland, *Dimensions of Politics in the European Parliament*, in *American Journal of Political Science*, 2006, p. 494; S. Hagemann, B. Hoyland, *Parties in the Council?*, in *Journal of European Public Policy*, 2008, p. 1205.

[40] In both domestic elections (for who will represent them in the Council) and European Parliament elections, voters vote for national political parties overwhelmingly aligned along this axis.

[41] On this more generally, see G. Goehler, *Constitution and Use of Power*, in H. Goverde *et al.* (eds), *Power in Contemporary Politics: Theories, Practices, Globalizations*, London: Sage, 2000.

### III.1. EU law's excessive responsibilisation of its subjects

When EU law, first, exercises a *power over* its subjects, a pervasive characteristic of this dimension is excessive responsibilisation. This derives from EU law competing with other legal orders, be they international or national, and other systems of governance (i.e. standardisation processes) for regulatory authority. Within the EU legal system, this is exemplified by the subsidiarity principle which prohibits the EU from legislating in most fields of competence unless it can be shown that the goals can be better realised by Union action.[42] Powerful market forces are also at work alongside this. If the EU legislature cannot demonstrate to constituencies who might otherwise clamour for EU law that it cannot provide an optimal regulatory measure, these will turn to substitutes. Indeed, this is what has happened with EU legislative activity declining by over half since 2010, hemmed in by national parliaments demanding more be done nationally, on the one hand, and transnational business turning increasingly to private international and European standardisation processes on the other.[43] With few other resources, the EU has to secure these "better activities" – be these a better environment, a stronger single market, more gender equality – through making legal demands on its subjects. It must get them to do more and do better. This is secured largely through imposing additional, more intensive responsibilities upon those actors – be these employers, suppliers, developers, consumers – who are seen as having the greatest capacity to make the activities regulated by it flourish.[44]

One sees the tensions provoked by this responsibilisation at every level. At the micro-level, the furore about halogen bulbs could not, therefore, be traced back to cost but to a sense that it was imposing significant new responsibilities on householders. Likewise, the fuss about *Vnuk* case was not that it threatened the British elite lawnmower or golf buggy industries but rather because it carried a responsibility to be insured onto private late. A similar pattern is present at the meso-level. In a survey of arguably the three most significant legislative proposals in 2008 – health care, carbon capture and storage – I found that all intensified and extended the responsibilities required of operators.[45] At the macro-level, the REFIT programme, which aims to examine the regulatory impact of EU law throughout its lifecycle, is nothing else than an administrative response to the excesses of this refrain of responsibilisation.[46]

[42] Art. 5, para. 3, TEU.

[43] D. Chalmers, M. Chaves, *EU Law-making and the State of European Democratic Agency*, in S. Hobolt, O. Cramme (eds), *Democratic Politics in a European Union under Stress*, Oxford: Oxford University Press, 2014.

[44] D. Chalmers, S. Trotter, *Fundamental Rights and Legal Wrongs: The Two Sides of the Same EU Coin*, in *European Law Journal*, 2016, pp. 9 e 14.

[45] D. Chalmers, *Gauging the Cumbersomeness of EU Law*, in *Current Legal Problems*, 2009, p. 405.

[46] Communication COM (2012) 746 final of 12 December 2012from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU Regulatory Fitness*. More detail on the programme can be found at the platform, ec.europa.eu.

### III.2. The obscure and destabilising features of what the European Union does

The second dimension to EU legal power is that EU law allows activities to be realised. Most saliently, the TFEU sets out a series of policies in Arts 3-4 TFEU which are to be realised largely through EU law. However, it happens more prevalently wherever an Action Programme or Plan is established which sets out a justification for series of laws, relates them to each other, ties their operation and scope to realisation of a series of objectives, and coordinates them with national law.

The characteristics of this dimension to EU legal power are its obscurity and destabilising qualities. If one looks at the examples earlier, there is weak identification at best with the policy goals served by the EU legislation, whether for good or for bad. There is little discussion of consumer, climate change or pedestrian safety issues, even as unreasonable demands. Instead, these EU laws are framed as presenting unwelcome demands with weakly specified motivations. The only exception to this is, of course, the dispute about holiday pay. In that instance, the British legislation was aligned with EU legislation with debate focusing along classic lines about the rights of poorly paid versus the increase in employer cost.

Its obscurity stems, in part, from EU law conferring few direct obligations or rights on private actors. Treaties and regulations, which formally are able to impose such obligations, rarely do.[47] Directives cannot as they are not capable of horizontal direct effect. Most private obligations are mediated by national law which is interpreted in the light of EU law. Alongside this, the deployment of EU law to realise EU policies means it is usually only deployed when it is an effective policy instrument. Justiciable rights granted to private parties are, from a policy-makers' perspective, rarely such an instrument as they may be used for unintended ends by unanticipated beneficiaries and be granted a meaning by courts which was not envisaged. The consequence is that very few individual rights are granted in the proportion to the scale of EU law. Research found, for example, that in the five year period between 2007 and 2011, one judgment during the whole of that period was given by the Court of Justice for about every 25 pieces of legislation.[48]

[47] Directly effective Treaty provisions include those on competition, equal pay for work for equal value, and, arguably in some couched form, free movement of persons. Extending horizontal direct effect to the latter has been controversial, H. Schepel, *Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law*, in *European Law Journal*, 2012, p. 177. It is difficult to find many examples in the case law of Regulations have horizontal direct effect, albeit that some clearly do, e.g. Regulation (EC) 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Arts 14-20.

[48] Insofar as many of the judgments concerned the same legal instrument, the actual proportions were, in fact, even higher, D. Chalmers, L. Barroso, *What Van Gend en Loos Stands For*, in *International Journal of Constitutional Law*, 2014, pp. 105, 124.

This obscurity and instability derives also from how EU law relates to the national legal system. The pioneering literature on diagonal conflicts illustrated that, in many instances, it was not a case of an EU law replacing a national law with an identical scope. Instead, conflicts emerged from a combination of the partiality of the EU legal order so that it would rarely fully govern a dispute and from its pursuing goals which cut across those of the national law.[49] This criss-crossing feature generates destabilising effects for each legal order which ripple out beyond the dispute. For, in each case, the law will contribute to the coherence and operation of a wider regime, be it national or EU. Its removal can lead, therefore, to incoherence and weak policy effectiveness across the regime.

### III.3. EU law's alienating depiction of life

The third dimension to EU legal power is that it sets out a picture which makes sense of social practice(s) and human association(s). EU law has a power here which transcends the relations it governs and has an identity of its own. When talk is of the single market, economic and monetary union or area of freedom, security and justice, an image is represented not simply of a series of relations but of a series of common projects. This image has the qualities of the imaginary of Charles Taylor:

> "[...] incorporates a sense of the normal expectations that we have of each other; the kind of common understanding which enables us to carry out the collective practices which make up our social life. This incorporates some sense of how we all fit together in carrying out the common practice. This understanding is both factual and 'normative'; that is, we have a sense of how things usually go, but this is interwoven with an idea of how they ought to go [...] this understanding supposes, if it is to make sense, a wider grasp of our whole predicament, how we stand to each other, how we got to where we are, how we relate to other groups, etc.".[50]

The imaginary set out by EU law has profoundly alienating qualities because it sets out a vision of human association based exclusively around shared or common activities. Well-being and meaning are derived in EU law from what citizens *do* together. Many find this too arid a view of common life, leading too easily to functionalism in which value is located in what makes the activities better or utilitarianism in which value is located in the activities bringing the greatest benefit to the greatest number. Modern community is often represented as also comprising another form of association, one based on the shared and collective co-presence of its members. They come together

[49] C. Schmid, *Diagonal Competence Conflicts Between European Competition Law and National Regulation: A Conflict of Laws Reconstruction of the Dispute on Book Price-fixing*, in *European Review of Private Law*, 2000, p. 155; R. Krämer, *The Notion of Diagonal Conflicts as a Key Concept of European Conflicts Law*, in C. Joerges, T. Ralli (eds), *After Globalisation New Patterns of Conflict and their Sociological and Legal Re-constructions (ARENA Report no. 4/11, RECON Report no. 15)*, Oslo: University of Oslo, 2011.

[50] C. Taylor, *Modern Social Imaginaries*, Durham: Duke University Press, 2003, p. 123.

simply because they *are*.[51] This absence shapes EU legal visions of property and fundamental rights. The individual or property only exists within EU law for their contribution to the collective activities established or regulated by EU law. Intellectual property rights are, therefore, to be established only in the context and establishment of the functioning of the single market.[52] Beyond this, EU law is not to prejudice national systems of property ownership.[53] In like vein, EU fundamental rights law only governs EU and national Institutions when these are acting in fields governed by other EU law.[54] There is also no EU legal vision of collective being as a social form, a notion of society. There is, thus, no independent EU norm of either justice or solidarity which acts as a basis for commitment between EU citizens irrespective of their activities or any sense of mutual dependence. Although the Union claims to be founded on the principles of representative democracy,[55] EU law struggles to set out on whose behalf the Union acts or, more symbolically, what vision of life it represents. The vision of EU law is, consequently, a functional and utilitarian one. It is also an arid one as a lexicon which forms important parts of national legal kaleidoscopes is only thinly present. If occasionally mentioned in EU legal provisions and judgment, there is no wider representation of what concepts such as autonomy, freedom, justice, equality, society or heritage mean beyond the case or application in hand.

EU law also misses out on the interaction between these two forms of association and co-presence. Yet this interaction is seen as fundamental and productive by thinkers of both left and right that it has to be seen as the building block of political community.[56] Elements can be found, therefore, in the distinction between *societas* and *universitas* made by Oakeshott,[57] purposeful living and external rationality by Husserl,[58] life-

[51] This presence does not have to be physical. It can be granted to past and future members of the community as well as those living outside the territory. All must share some defining tie which does not go to what they do, however.

[52] Art. 118 TFEU

[53] Art. 345 TFEU.

[54] On the level of connection for this see, recently, Court of Justice, judgment of 10 July 2014, case C-198/13, *Julian Hernández*.

[55] Art. 10, para. 1, TEU.

[56] Their respective origins can be traced to the political associations which emerged in the Middle Ages. The *societas* reflects the first and the *universitas* and *comunis utilitas* the latter. On the former see O. VON GIERKE, *Natural Law and the Theory of Society 1500-1800*, Boston: Lawbook Exchange, 1950, transl. E. Barker, pp. 44-79 and on the latter see W. BLOCKMANS, P. HOPPENBROUWERS, *Introduction to Medieval Europe 300–1500*, London, New York: Routledge, 2014, pp. 312-314; H. HÖPFL, *Jesuit Political Thought: The Society of Jesus and the State, c.1540–1630,* Cambridge: Cambridge University Press, 2004, p. 282 *et seq*.

[57] M. OAKESHOTT, *The Vocabulary of a Modern European State*, Exeter: Imprint, 2008, p. 245.

[58] E. HUSSERL, *The Vienna Lecture: Philosophy and the Crisis of European Humanity*, in E. HUSSERL (ed.), *Crisis of European Sciences and Transcendental Phenomenology*, Chicago: Northwestern University, 1970, transl. D. Carr.

world and system by Habermas,[59] or the distinction between the drives of singularity and transformation in Kristeva.[60] This interaction, however, forms the backdrop to decisions about when law is deployed, namely whether a single market law would contribute to a vision of shared human life that we like, and how it is interpreted. The absent interaction leads to a heavy instrumentalisation of those laws most strongly associated with protecting human dignity. Mention has already been made that individual rights granted by EU law are few and selective as they are generally only granted when this would be an effective way of realising a particular policy.[61] A study by myself and Sarah Trotter found a parallel dynamic with regard to fundamental rights. The majority of EU fundamental rights cases involved fundamental rights being used as a guide to EU legislation. However, they rarely acted as a powerful independent guide or source of review. Instead, they and the legislation were attributed a wider objective of sustaining the European political economy and interpreted in the light of this. This weakened the normative force of these rights, provided often odd interpretations of them, and resulted in their often providing only rhetorical justification for EU legislation.[62]

## IV. Unconfined EU legal power?

### IV.1. The confines of the Treaties

These qualities of excessive responsibilisation, opacity, destabilisation and alienation are inevitable as they stem, respectively, from EU law having to compete for authority, its partial scope which cuts across national regimes, and its being an association based around shared activities. Furthermore, the more it competes, seeks to secure the coherence of its laws or the effectiveness of its policies, the more it will exacerbate these qualities as the latter are by-products of the former. They sit aside and are a corollary to EU law's more positive qualities. They are unconfined in that they cannot be addressed by the conferred power doctrine as they are endemic to all EU law. The question is, therefore, not whether they can be prevented but rather whether their effects can be softened or checks and balances can be found.

Interestingly, the Treaty provides a number of institutions and values which EU law must *respect* and which could provide such checks. These include human rights,[63] cultural and linguistic diversity,[64] the principles of the UN Charter,[65] national identities,[66]

[59] J. Habermas, *Outline of a Theory of Communicative Action: The Critique of Functionalist Reason*, Cambridge: Polity, 1987, pp. 119-197.

[60] J. Kristeva, *The Crisis of the European Subject*, cit., Ch. 3.

[61] D. Chalmers, L. Barroso, *What Van Gend en Loos Stands For*, cit.

[62] D. Chalmers, S. Trotter, *Fundamental Rights and Legal Wrongs*, cit., p. 9.

[63] Art. 2 TEU; Art. 67, para. 1, TEU.

[64] Art. 3, para. 3, TEU; Art. 167, para. 1, TFEU.

[65] Art. 3, para. 5, TEU; Art. 21 TEU.

agricultural laws on religious rites, traditions and regional heritage,[67] the status of churches, religious, philosophical and confessional organisations,[68] and national responsibilities for the definition, organisation and delivery of public health care.[69] Alongside these, national security[70] and property rights[71] at least on the face of the Treaty seem to be ring-fenced off from EU law curbs. Finally, the Treaties makes clear EU citizenship is additional to (and one would infer of a second order to) national citizenship.[72]

Respect, as the philosopher Stephen Darwall notes, involves not merely recognising the presence of phenomena but also valuing them on their own terms rather than because they serve some ulterior objective.[73] It touches at something deeper, therefore, than simply secure the formal status of all the above, but also goes to valuing what they represent. If these phenomena are to confine and soften EU legal power, therefore, protection must be offered not merely to their formal features but also to the broaden visions that they represent.

In this, they seem to cluster around four images. First, there are human rights. Respect must be accorded to the particular legal institution or text insofar it formally protects individual autonomy. The resonance of human rights also lies in their representing deeper, possibly more inchoate moral values which are never fully subsumed in the text. And these must also be respected.[74] Secondly, there are those headings which go to individual and collective security. If this comprises formal protection from physical threats,[75] security also represents an environment which protects status, self-esteem and vulnerability. It safeguards routines, traditions, and beliefs which provide common fabrics of meaning which, in turn, allow people to locate themselves and generate narratives about their lives.[76] Thirdly, there are structures which contribute significantly to ascribed collective identities. These identities are those possessed by individuals regardless of what they do or any capacity they enjoy. They can be identities based on faith, nation-

[66] Art. 4, para. 2, TEU.

[67] Art. 13 TFEU.

[68] Art. 17 TFEU

[69] Art. 168, para. 7, TFEU.

[70] Art. 4, para. 2, TEU; Art. 346 TFEU.

[71] Art. 345 TFEU.

[72] Art. 20 TFEU.

[73] S. DARWALL, *Two Kinds of Respect*, in *Ethics*, 1977, p. 36; S. DARWALL, *The Second Person Standpoint: Morality, Respect, and Accountability*, Cambridge: Harvard University Press, 2006, pp. 120-137.

[74] This duality is famously noted in J. HABERMAS, *Kant's Idea of Perpetual Peace: At Two Hundred Years*, in C. CRONIN, P. DE GREIFF (eds), *The Inclusion of the Other: Studies in Political Theory*, Cambridge: MIT Press, 1998, pp. 165 and 189-191.

[75] On how security is never just about former safety but goes to question of affect and collective identity-formation see I. LOADER, N. WALKER, *Civilising Security*, Cambridge: Cambridge University Press, 2007, pp. 146-66.

[76] Famously on this, see C. GEERTZ, *The Interpretation of Cultures*, New York: Basic Books, 1973, p. 145.

ality, ethnicity or place. Formal markers of such identities go to questions of *what we are* and focus on common external traits which allow members to identify one another. The formal qualities rarely go to what these identities mean for members. Membership also goes to questions of *who we are* and a search for authenticity[77] with a series of symbols and narratives serving to help the individual locate herself within the community and to relate to members and non-members of that community. Fourthly, there is citizenship.[78] Formally, it endows individuals with sufficient civic, economic, political and social entitlements that they can be considered free and equal members of a political community. Citizenship possesses a representative duality that other identities do not. It involves, on the one hand, a right to represent the community. It is, thus, conceived of as a practice, be it political or social, whereby individuals through exercise of their entitlements articulate a particular vision of freedom and equality. On the other hand, citizenship has a symbolic dimension. In this, it represents both a sense of belonging to a political community and an emotional tie to other members of that community.

### IV.2. The casual disregard for EU legal power by the Court of Justice

A case can be made that EU law not merely respects but also contributes to a richer realisation of these phenomena. The EU has thus its own policies and law on fundamental rights, collective security and EU citizenship. There is also an impressive literature on how development of a European identity can enlarge national identities.[79] This is all very well but there is no respect of somebody or something if the beholder claims of a monopoly of authoritative voice over what or who it is. It is only to be what EU law conceives it as or within the limits conceived for it by EU law.

This has happened by virtue of these phenomena being subject to the rigours of the proportionality principle when they cross EU law.[80] This principle requires the domestic measure to be taken in good faith, be suitable to realising legitimate goals, necessary for realising these, consistent and no more restrictive than is necessary. This principles seeks to confine these phenomena, limit their operation and make their invo-

[77] C. Guignon, *On Being Authentic*, London, New York: Routledge, 2004, p. 146 *et seq*.; J. Christman, *The Politics of Persons*, Oxford: Oxford University Press, 2011, p. 4.

[78] These, as well as relevant literature, are set out D. Leydet, *Citizenship*, in *The Stanford Encyclopedia of Philosophy*, Spring, 2014, plato.stanford.edu.

[79] J. Weiler, *To be a European Citizen—Eros and Civilization*, in *Journal of European Public Policy*, 1997, p. 495; J. Kristeva, *The Crisis of the European Subject*, cit., Ch. 3; U. Beck, E. Grande, *Cosmopolitan Europe*, Oxford: Polity, 2007, pp. 6–9 and 225–240; R. Gasché, *Europe, or the Infinite Task: A Study of a Philosophical Concept*, Palo Alto: Stanford University Press, 2009, p. 342.

[80] The challenges of the principle are noted in E. Cloot, *National Identity in EU Law*, Oxford: Oxford University Press, 2015. She proposes, instead, that if certain processes or values fall into certain categories, they would not be subject to proportionality review, *ivi*, pp. 210-214. The scope of this protection is limited having to be in the national constitution or an equivalent document.

cation as minimally disruptive to EU law as possible.[81] The Court has, therefore, indicated that the Treaty provisions allowing national security measures to be taken must be interpreted strictly[82] and be narrowly construed.[83] There should be no presumption that reasons provided by national authorities that security is compromised are either valid or show that it is so compromised.[84] A similar tone permeates interpretation of the EU law provisions on national identity. National restrictions on what names may be used have been successfully protected largely because they were seen as proportionate ways to protect the official languages of Member States[85] or to combat historical excesses of the aristocracy.[86] Wider invocations of national and constitutional identities have, however, been dismissed by the Court with little reasons given.[87] Perhaps the strongest example was with regard to national citizenship in the judgment of *Rottmann*.[88] The Court noted that the grant and loss of nationality was a matter for national law but then stated it had to have due regard for EU law. Insofar as it might deprive an individual of their EU citizenship rights, the Court held that it would only be lawful if the removal of citizenship was for a legitimate interest and proportionate. The very cornerstone of citizenship, the terms under which individuals held it and the tie it expressed between individual and community, were, therefore, to be constrained by EU law. It is very difficult to see how EU citizenship can be derivative of national citizenship if it can shape the latter's terms in this way.[89]

[81] F. DE WITTE, *Sex, Drugs & EU law: The Recognition of Ethical and Moral Diversity in Europe*, in *Common Market Law Review*, 2015, pp. 1545 and 1566-1570.

[82] Court of Justice, judgment of 15 December 2009, case C‑284/05, *European Commission v. Finland* [GC], para. 46.

[83] Court of Justice, judgment of 4 September 2014, case C-474/12, *Schiebel Aircraft*, para. 33.

[84] Court of Justice, judgment of 4 June 2013, case C-300/11, *ZZ* [GC], para. 61.

[85] Court of Justice, judgment of 12 May 2011, case C-391/09, *Runevič-Vardyn and Wardyn*.

[86] Court of Justice, judgment of 22 December 2010, case C-208/09, *Sayn-Wittgenstein*; Court of Justice, judgment of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*.

[87] Court of Justice, judgment of 24 May 2011, case C-51/08, *European Commission v. Luxembourg* [GC]; Court of Justice, judgment of 1 March 2012, case C-393/10, *O'Brien*, para. 49; Court of Justice, judgment of 16 April 2013, case C-202/11, *Las* [GC], paras 30-33; Court of Justice, judgment of 17 July 2014, joined cases C-58/13 and C-59/19, *Torresi* [GC], paras 56, 57. A defence based on constitutional identity was most dismissively addressed in Opinion of AG Villalón delivered on 14 January 2015, case C-62/14, *Gauweiler and others* [GC], para. 59 where he stated that "[…] it seems to me an all but impossible task to preserve this Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as 'constitutional identity'".

[88] Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann* [GC].

[89] With regard to fundamental rights the proportionality principle was famously invoked in Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval un Partneri* [GC], to hold that an exercise of the right to collective action unlawfully infringed free provision of services. This was a rare instance, however. The majority of EU fundamental rights cases involve interpretation of EU legislation where the right

### IV.3. The impoverished vocabulary of national constitutional courts

The consequence is that it has fallen to national constitutional courts to protect constitutional rights, collective identity, security and citizenship from the constraints of EU law. As early as 1973, the Italian Constitutional Court stated that EU law must not transgress on "civil, ethico-social, or political relations".[90] Identity review, whereby a national court reserves the right to disapply EU law because it violates a national democratic or constitutional identity, forms part of the constitutional law of at least 12 Member States.[91] Whilst national courts have said less about national security, the 28 Heads of State and Government emphasised in February 2016 that national security was the sole responsibility of each Member State and was not, therefore, to be seen as a derogation under EU law which should be interpreted strictly.[92] Judicial antagonism has been most marked on national citizenship. There has been opposition to EU law restrictions on when States can remove citizenship from their own nationals;[93] to replacement of national constitutional rights by EU fundamental rights[94] in large part because the former are seen as central to the substance of national citizenship; and to encroachment by EU law on political and social rights identified with national citizenship. On political rights, national courts have objected to EU legal interference over who can vote,[95] the internal deliberation of legislatures[96] and to significant displacement of national representative institutions by EU law.[97] They have also been keen to protect that compact sometimes

and legislation are brought together through being interpreted in the light of a wider narrative of sustaining the European political economy, D. Chalmers, S. Trotter, *Fundamental Rights and Legal Wrongs*, cit.

[90] Italian Constitutional Court, judgment of 27 December 1973, no. 183, para. 21. Similar language was used in German Federal Constitutional Court, judgment of 30 June 2009, 2 BvE 2/08, para. 249.

[91] On the list see German Federal Constitutional Court, order of 14 January 2014, 2 BvR 2728/13, para. 30.

[92] Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within The European Union, in Annex 1 of European Council Conclusions of 19 February 2016, Section C, para. 5.

[93] United Kingdom Supreme Court, judgment of 25 March 2015, *Pham v. Secretary of State for the Home Department*, paras 85-90.

[94] Latvian Constitutional Court, judgment of 7 April 2009, case 2008-35-01, *Ratification of the Lisbon Treaty*; Hungarian Constitutional Court, judgment of 25 May 2004, decision 17/04, regarding Agricultural Surpluses; Polish Constitutional Court, judgment of 11 May 2005, no. K 18/04, *Polish Accession to the European Union*; Czech Constitutional Court, judgment of 3 March 2008, Pl ÚS 50/04, *Sugar Quotas III*; German Federal Constitutional Court, judgment of 24 April 2013, 1 BvR 1215/07.

[95] English and Welsh Court of Appeal, judgment of 20 May 2016, case C1/2016/1796, EWCA Civ-469, *Shindler and Anr v. Chancellor of the Duchy of Lancaster and Anr*.

[96] United Kingdom Supreme Court, judgment of 22 January 2014, *R v. The Secretary of State for Transport ex parte HS2 Action Alliance Limited*.

[97] German Federal Constitutional Court, judgment of 18 March 2014, 2 BvR 1390/12; Latvian Constitutional Court, judgment of 7 April 2009, no. 2008-35-01, *Re Ratification of the Lisbon Treaty*, para. 207. In similar vein see Supreme Court of Estonia, judgment of 12 July 2012, case 3-4-1-6-12, *ESM Treaty*, paras 131 *et seq*.

seen as distinguishing the political authority of liberal democracies, namely that the State's power to punish citizens derives its legitimacy from their being able to contribute to the making of the laws which do this.[98] On social rights, national courts have been concerned about EU intervention, be it directly through EU law or more indirectly through processes such as the European Stability Mechanism, on health care,[99] pensions;[100] and social policy and social justice more generally.[101]

These courts are, however, institutionally poorly equipped to protect against destabilising encroachment by EU law. Little EU law is litigated with the consequence that the protections offered by the judiciary only serve to protect that part of it. Even there, the issues before them may be framed in slanted ways or framed too narrowly by the dispute in hand. The formal nature of their reasoning will rarely engage, furthermore, with what these phenomena of human rights, citizenship, collective identity and security represent. The national case law on citizenship focuses on protecting the legal entitlements associated with it but not on how EU law destabilises its other dimensions, namely political engagement and citizens' sense of belonging. Yet research has shown that EU integration has affected domestic political engagement significantly. As it is impossible for national citizens to vote out the government of the EU, discontent is, instead, directed at national governments who are seen as proxies for the EU.[102] This has contributed to the electoral emergence of populist parties who not only express anger at the operation of domestic institutions but do so within the context of challenging European integration.[103] In parallel to this, if there is little evidence that European integra-

[98] Polish Constitutional Tribunal, judgment of 27 April 2005, no. P 1/05, *Re Enforcement of a European Arrest Warrant*; Czech Constitutional Court, judgment of 3 May 2006, no. Pl. ÚS 66/04, *Re Constitutionality of Framework Decision on the European Arrest Warrant*; Supreme Court of Cyprus, judgment of 7 November 2005, *Attorney General of the Republic of Cyprus v. Konstantinou*; Athenian Court of Appeal, judgment of 10 May 2007, no. 25, *Re Enforcement of a European Arrest Warrant against Tzoannos*.

[99] Italian State Council, judgment of 8 August 2005, case 4207/05, *Admenta et al. v. Federfarma et al.*; Greek Council of State, judgment of 4 June 2014, 8 Cte 1906/2014, Olom *EYDAP*.

[100] Czech Constitutional Court, judgment of 31 January 2012, Pl ÚS 5/12, *Slovak Pensions*; Portuguese Constitutional Tribunal, judgment of 22 April 2013, no. 187/2013, *State Budget 2012*; Portuguese Constitutional Tribunal, judgment of 18 December 2013, no. 862/13, *State Pensions*; Portuguese Constitutional Tribunal, judgment of 30 May 2014, no. 413/2014, *State Budget 2014*.

[101] Polish Constitutional Tribunal, judgment of 24 November 2010, K 32/09, *Lisbon Treaty*.

[102] S. Hobolt, J. Tilley, *Blaming Europe? Responsibility Without Accountability in the European Union*, Oxford: Oxford University Press, 2014, Conclusion; M. Aresa, B. Cekab, H. Kriesi, *Diffuse Support for the European Union: Spillover Effects of the Politicization of the European Integration Process at the Domestic Level*, in *Journal of European Public Policy*, 2016 (early view).

[103] These exist across the left/right spectrum. They include UKIP in the United Kingdom, AfD in Germany, Front Nationale in France, Podemos in Spain, the Five Star Movement in Italy, Syriza in Greece, the True Finns in Finland and Liberty and Hope in Poland.

tion changes citizens' trust in one another,[104] there is evidence that it is perceived as forming part of a kaleidoscope of remorseless, large scale phenomena – such as globalisation, mass migration or the economy – which unsettle individuals' sense of self.[105]

This interplay has had significant effects, however, for how these issues of identity, security etc., are represented. The Court of Justice refers to them as no more than concepts. They are generic notions with domestic invocations doing no more than providing particular examples of these concepts. The problem with this construction is that it presents only half a picture. As an abstract model, it cannot identify how identity, security etc., are experienced, practiced, perceived or symbolised.[106] In the absence of this, it has fallen, once again, on national judiciaries to set out what these phenomena represent. The context of the task asked of them by EU law has above all shaped their representations. It has led them to establish a domestic calculus of value which provides a basis for more valued laws to be protected from EU law and less valued ones to be overridden by it. The protection of human rights, collective identities, citizenship and security has, thus, become submerged within a wider judicial language of defending national sovereignty. It has been most explicitly couched in these terms by the French Constitutional Council who has talked of protecting "conditions essential for the exercise of national sovereignty"[107] and the Hungarian Constitutional Court who has stated that it will protect that "State's independence, her rule of law character and her sovereignty".[108] However, other courts have talked in similar terms about protecting the "essence"[109] or "identity"[110] of the State.

What is the content of this sovereignty which is deployed to supply this calculus of values? National courts have resorted to received notions inherited from the Middle Ages, namely that of the body politic, to determine upon which side of the line different laws fall. This image casts political communities in the image of a sacred and eternal human body. Laws perceived as expressing this image strongly are to be protected. Like

[104] B. WESTLE, T.-M. KLEINER, *Trust towards other People: Co-nationals, Europeans, People Outside Europe*, in B. WESTLE, P. SEGATTI (eds), *European Identity in the Context of National Identity: Questions of Identity in Sixteen European Countries in the Wake of the Financial Crisis*, Oxford: Oxford University Press, 2016.

[105] J. WHITE, *Political Allegiance after European Integration*, Basingstoke: Palgrave, 2011, Ch. 6.

[106] This point has been well established and famously made in the philosophical literature, T. NAGEL, *What Is It Like To Be a Bat?*, in *Philosophical Review*, 1974, p. 435.

[107] French Constitutional Council, decision of 19 June 1970, no. 70-39 DC, *Own Resources Decision*; French Constitutional Council, decision of 9 August 2012, no. 2012/653 DC, *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, para. 16.

[108] Hungarian Constitutional Court, decision of 14 July 2010, no. 143/10, *Lisbon Treaty*.

[109] Czech Constitutional Court, judgment of 8 March 2006, no. Pl. ÚS 50/04, *Re Czech Sugar Quotas*, para. 109.

[110] Polish Constitutional Tribunal, judgment of 24 November 2010, K. 32.09, *Lisbon Treaty*, para. 2.1. Similar language has been used in Spain, Spanish Constitutional Court, judgment of 13 December 2004, declaration 1/2004, *Constitutional Treaty*, ground 2; Spanish Constitutional Court, judgment of 13 February 2014, decision 26/2014, *Melloni*, ground 3.

the human body, the body politic represents society or the political community as a single, indivisible whole. Laws expressing this unitary vision, be these criminal, fiscal or social laws, have been protected. Equally, the body politic has an image of the body as something hallowed and eternal. Courts have moved to protect laws seen as expressing hallowed or eternal qualities: examples include nationality, citizenship, religious and fundamental rights laws as well as laws protecting the national territory.[111]

This image of the body politic has a very tainted legacy in Europe. It can put in play three egregious dynamics. The first is that visioning a political community as a human body can slide very quickly into a racist politics. Biological metaphors and justifications become central to membership of the community and to aspirations of members of that community. Secondly, the body politic justifies extraordinary administrative centralisation. It accords the highest value to meeting the needs of the imaginary whole allowing central administrations to claim not only that they are uniquely placed to meet these needs but also to determine what these needs are. Thirdly, and finally, the body politic excludes diversity and debate. For views conveying internal tensions, contradictions or conflicts go against the unitary qualities of its vision.

## V. The incidence, dynamics and significance of EU legal conflicts

It is time to relate these unconfined qualities of EU legal power back to the incidence, dynamics and significance of EU legal conflicts and to show how they contribute to these.

### V.1. The incidence of conflicts: expert and non expert worlds

The need to perform better than other regulatory or legislative arenas pushes the EU not merely to responsibilise its subjects but also to seek better solutions and that means technological solutions which are safer, more regulatory effective, more ecological and more competitive than those offered by these other arenas. Technological expertise, and keeping abreast of it, is central to this competitive effort. It is present in many norms which EU laws must incorporate.[112] It justifies the institutional design of EU governance, with both comitology and European standardisation procedures em-

[111] D. Chalmers, *European Restatements of Sovereignty*, in R. Rawlings *et al*. (eds), *Sovereignty and the Law*, Oxford: Oxford University Press, 2013, p. 186.

[112] There are a number of examples. Single market legislation must take account of any new scientific development, Art. 114, para. 3, TFEU, environmental legislation of available scientific data, Art. 191, para. 3, TFEU; whether a product is safe enough to marketed will be assessed in light of the state and technology, Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, Art. 3, para. 3, let. e; and standards in the field of electronic communication must be removed if they impede technological development, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, Art. 17, para. 5.

powered because of their perceived adaptiveness to such developments. Finally, it exists in the politics of legislative agenda-setting, appearing to be the driving force behind the largest number of proposals made by the Commission.[113]

Technological developments involve, however, experts telling the public that understandings of the world have changed and that they have to change their behaviour accordingly resulting in the establishment of an "expert/lay" divide.[114] This divide arises from expertise attributing meaning to patterns, events or things which are invisible to non-experts.[115] Expert-led narratives, furthermore, are not simply disempowering for non-experts but provide accounts which suggest a different way of looking at the world from non-experts. Adapting behaviour and incurring costs to meet their claims involves non-experts vesting significant trust in expertise, therefore, when there may be reasons not to. This trust may be in particular short supply where its purveyor, as is the case with the EU, is seen as either unaccountable or as using it for its own ends.

The incidence of many conflicts in EU law, thus, mirrors those circumstances where this "expert/lay" divide is most likely to lead to contestation.

The first is where expertise is used to justify an underlying activity which challenges prior beliefs of non-experts[116] or which they believe to be immoral.[117] Examples within the EU include the authorisation of genetically modified organisms or carbon capture and storage, vouching for industrial farming, or formulating measures taken to restore national public finances. In such instances, expertise may be being deployed to establish the safety of certain processes or products or, in the case of public finances, to restore their equilibrium. However, the problem is too narrowly framed. It does not address wider questions which significant members of the public may think significant: be it broader ethical or religious questions about tampering with Nature, the emotional relationship between many humans and their food, or the distributive consequences and hardship provoked by austerity. This meme is present not only in these grand narratives but also at the micro-level. The reaction provoked by *Vnuk* case, with its re-

[113] Figures are rather out-dated but during the *Future of Europe* Convention, the Commission suggested that 35 per cent of its proposals were a result of this with only 17 per cent being response to national government requests and only five per cent at its own behest. See House of Lords, European Union Committee, report of session 2007–08 of 24 July 2008, *Initiation of EU Legislation*, p. 15. There is little reason to believe that this will have changed much.

[114] There is an enormous literature on this. A good starting point is H. MARGOLIS, *Dealing with Risk: Why the Public and the Experts Disagree on Environmental Issues*, Chicago: University of Chicago Press, 1997.

[115] K. ERICSSON, N. CHARNESS, *Expert Performance: Its Structure and Acquisition*, in *American Psychologist*, 1994, p. 725. Ericsson and his collaborators furthermore found it took thousands of hours of inculcation in this expertise before these phenomena became tractable in those terms to the observer. K. ERICSSON *et al.*, *The Role of Deliberate Practice in the Acquisition of Expert Performance*, in *Psychological Review*, 1993, p. 363.

[116] P. KRAFT, M. LODGE, C. TABER, *Why People "Don't Trust the Evidence" Motivated Reasoning and Scientific Beliefs*, in *Annals of the American Academy of Political and Social Science*, 2015, p. 121.

[117] D. KAHAN, *Cultural Cognition of Scientific Consensus*, in *Journal of Risk Research*, 2011, p. 147.

quirements that vehicles be insured on private land, arose, if one reads the press coverage, above all from the sense of being taxed for use of one's own private land: an idea which generated some resentment.

The second is where the motivation behind the law is unclear to non-experts. Most citizens neither have the resources nor incentives to invest significant time in engaging with political decisions or laws. They, therefore, look for cues to help them decide if a particular technology or law fits with their worldview.[118] If these cues are insufficiently determinate, which can be the case either where the risk is poorly communicated or where it is so diffuse that it can appear obscure, there is likely to be contestation.[119] The EU suffers from both of these. The rationales behind some of its measures are either not reported or distorted by the press. At the same time, by virtue of its scale, it tackles a number of phenomena of epic proportions, such as climate change or systemic risk in the financial sector, where the relationship between individual measures (e.g. that between banning halogen lamps and climate change targets) and realisation of the overall goal is often remote.[120]

The third is where EU law provokes anxiety. A large part of the divide derives from non-experts' views being shaped by the experience of risk whilst experts are concerned with the analysis of risk.[121] Public opinion is, thus, biased in its perception of risk towards protecting the status quo as risk is not experienced as out of the ordinary in the day-to-day.[122] Non-experts also attach greater weight to the distributive consequences of risks or risks leading to events which inspire dread effects.[123] This tension is most accentuated, and a politics of anxiety arises if a measure provokes a destabilising tension between a valued status, relations and/or place, on the one hand, and the fear of a wider threatening, precarious environment which can destroy the value in the former, on the other. This politics is most likely, therefore, where EU law intrudes in a secure place, such as the home; touches on intimate relations, such as the family; or destabilises beliefs about ex-

[118] M. Finucane *et al.*, *The Affect Heuristic in Judgment of Risks and Benefits*, in *Journal of Behavioral Decision Making*, 2000, p. 1.

[119] Sunstein talks, therefore, of the availability heuristic whereby non-experts assess risks on the basis of how it is easy for them to identify examples of where these have gone bad. If risks can only be described abstractly, they tend to be under-estimated. C. Sunstein, *Laws of Fear: Beyond the Precautionary Principle*, Cambridge: Cambridge University Press, 2005, pp. 35-36.

[120] Research has, therefore, found psychic numbing whereby non-experts do not respond in the same way as experts to large scale risks (i.e. they minimise them), such as climate change, automobile deaths or financial catastrophe, N. Dieckmann *et al*., *At Home on the Range? Lay Interpretations of Numerical Uncertainty Ranges*, in *Risk Analysis*, 2015, p. 1281.

[121] P. Slovic *et al*., *Risk as Analysis and Risk as Feelings: Some Thoughts about Affect, Reason, Risk, and Rationality*, in *Risk Analysis*, 2004, p. 311.

[122] T. Bolsen, J. Druckman, F. Lomax Cook, *How Frames Can Undermine Support for Scientific Adaptations: Politicization and the Status-Quo Bias*, in *Public Opinion Quarterly*, 2014, p. 1.

[123] R. Kasperson *et al*., *The Social Amplification of Risk: A Conceptual Framework*, in *Risk Analysis*, 1988, p. 177; C. Sunstein, *Terrorism and Probability Neglect*, in *Journal of Risk and Uncertainty*, 2003, p. 121.

isting entitlements.[124] Talk about the intrusiveness of EU law invariably touches to a stronger or lesser degree on this anxiety as this notion of intrusion expresses the idea of something extraneous in a familiar space which is tarnishing that space.[125]

There is a fourth situation which is provoked less by technology but rather by EU laws generating unanticipated developments with sharp and sudden redistributive economic consequences. These consequences are distinguishable from those of much EU law by virtue of their not being foreseen. The conflicts described are, therefore, rare, but the migration of EU citizens since 2004, the sovereign debt crisis and the refugee crisis of 2014 and 2015 are all examples. In such circumstances, the EU legislative need to perform better generates such strong externalities that a strong Union response is demanded. The EU is, thus, held to blame as much for this response as for its contribution to the initial situation: be this the measures which contributed to austerity in many EU States, the break-down of the Schengen and Dublin systems in the wake of the refugee crisis or unflinching interpretations of free movement in light of the scale and nature of EU migration. In this, the EU responds in an analogous manner to its response to technological developments. It emphasises the collective benefits to the Union as whole and puts, in fact, new forms of expertise or expert-based procedures to rectify any problems. Scant attention is paid to the distributive or disruptive effects of the policy, its effect on settled routines or beliefs, or on individual or collective securities. The possibility for similar cleavages, therefore, emerges: those of change versus anxiety; collective gains versus distributive consequences; those of pan Union versus local scales of action; and judgments based on the analysis of reality versus those based on its experience.

The Union's response to the sovereign debt crisis was, thus, to introduce a whole new administrative apparatus to secure (in the EU's eyes) better national economic and fiscal performance. Procedures were brought in to assess not just budget deficits but economic performance more generally and fiscal performance across the cycle. States were to reform their administrations to secure more reliable statistics, independent fiscal councils to measure better their fiscal performance, and to introduce fiscal rules to identify budgetary targets and review for all parts of government.[126] There was nothing on the effects on job insecurity, wages, the quality of public services, hardship or levels of inequality or hardship within EU societies. Equally, the Commission has been quick to praise the net fiscal effects of EU mobility of persons, its contribution to EU GDP, tackling

[124] Examples of the latter include a State's own nationals expressing discontent over EU citizens having access to preferred social housing or (for their children) to preferred schools.

[125] The imagery of the press coverage about EU proposals for kitchen gloves focussed, therefore, on EU law as something which was in and meddling with the kitchen sink. The kitchen sink is, of course, the place from where food waste has to be removed.

[126] D. CHALMERS, *Crisis Reconfiguration of the European Constitutional State*, in D. CHALMERS, M. JACHTENFUCHS, C. JOERGES (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity*, Cambridge: Cambridge University Press, 2016, pp. 266 and 272-275.

skills shortages and the high number of mobile EU citizens in employment.[127] However, neither pressures on housing, school places or wage rates are addressed in the host society nor questions of skills shortages and depopulation in the State of nationality nor how labour mobility has changed communities, towns and regions across the Union.[128]

### V.2. The dynamics of contestation: the dislocation of the familiar and authoritarian overreach

It is still unclear what endows these social conflicts with such intensity and salience that they become a source of political or legal contestation within an EU legal context when this would be unlikely if the matter was governed solely by domestic regulation. The answer lies in these disputes being framed as EU disputes rather than disputes above gloves etc. The gloves, insurance, light bulbs are all seen as yet another example of EU interference. Each dispute is only made sense of through resort to a broader narrative about EU legal intrusion or disruption. This narrative provides these conflicts with a common EU hallmark and is central to their transformation into political and legal conflicts.

This narrative has two threads which emerge out the destabilising and opaque qualities of EU law. If contestation only occurs when something of value is destabilised, a curiosity is that most of these activities are humdrum. Few would place the art of dishwashing as their central political concern! The significance attributed to them can only be because they represent something else of value. The first thread goes to this. However, in much of the contestation described above, the destabilisation was anticipated rather than present. Contestation could only occur because there was already some prior association about what EU does and how this threatens this object of value. To be sure, EU law's obscurity facilitates this as it allows many things to be projected onto EU law independently of actual veracity, but the second thread goes to how EU law's enables it to be perceived as a threat to certain activities but not to others.

*A threat to civil identities.*

To be valuable, the contested activities must generate a series of attachments about which there is a fear of loss. A feature of these activities is their everyday nature. Such activities are not associated with generating primordial identities, based on race or ethnicity, nor are they associated with those identities which create a relationship with the sublime, such as religious identities or those based around human rights. Correspond-

[127] Communication COM (2013) 837 final of 25 November 2013 from the Commission on Free Movement of EU Citizens and Their Families: Five Actions to Make a Difference, paras 1-4.

[128] A similar style of governing is emerging in response to the refugee crisis. There will be increased capacity and technology deployed to secure the Union's external frontier, administrative reform and increased capacity to speed up the processing of requests for international protection, and measures to prevent movements of asylum seekers within the EU, Communication COM (2016) 197 final of 6 April 2016 from the Commission on a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe.

ingly, there is little popular opposition to the EU law, or the EU more generally, because of either its foreign-ness or its simple presence,[129] and no evidence of any opposition to it, beyond a few academics and public intellectuals, because it is seen as amoral.

Attachments are instead "constructed on the basis of familiarity with implicit and explicit rules of conduct, traditions, and social routines that define and demarcate the boundary of the collectivity".[130] These civil identities root personal and collective narratives in the daily activities of ordinary life: be these (in the examples of earlier) driving, cooking or turning the light on in one's own home. They also relate these activities to wider boundary setting of "them" and "us" so that these activities become general markers of nationhood or cultural identity. They also allow individuals to move between perceptions of scale by linking the grand meta-narratives of nationhood and society and the micro-level of the everyday.[131]

The power of these identities lies, in part, in the relationship they draw with the past.[132] They grant it a place in the present. Daily activities are passed down through families, schools, workplaces and act as a continual reminder of people's close relations. They also constitute reminders of personal narratives contributing both to a sense of personal stability and a life story. Alongside this, they sacralise the past. Insofar as these routines, places, traditions are taken for granted, they cease to be questioned and become something which makes us who we are.[133] Finally, they allow change to be evolutionary rather than dramatic or revolutionary. New activities emerge as modifications to existing activities where the bulk of what is being done appears unchanged and where the new merges over time into the established.

Their power also lies in their having authoritative qualities which are neither political, legal nor economic in nature, and which serve as counterpoints to overreach by any of the latter. This authority may stem from the activities at the heart of this identity being associated with some authority figure or significant event, or from the activities "frequent anonymous appearance in the past".[134] However, this authority requires no

[129] Very little of the opposition to the EU has thus been the EU *per se* or to the idea of Europeanness. It is rather because of what the European Union does, even if opposition takes the form of blaming the EU as an institution rather than just contesting the particular policy. P. TAGGART, A. SZCZERBIAK, *Introduction: Opposing Europe? The Politics of Euroscepticism in Europe*, in A. SZCZERBIAK, P. TAGGART (eds), *Opposing Europe? The Comparative Party Politics of Euroscepticism*, Oxford: Oxford University Press, 2008, pp. 1 and 7-10.

[130] S. EISENSTADT, *The Construction of Collective Identities: Some Analytical and Comparative Indications*, in *European Journal of Social Theory*, 1998, pp. 229 and 232.

[131] P. SEGATTI, B. WESTLE, *An Exploration of Europeans' Identities*, in B. WESTLE, P. SEGATTI (eds), *European Identity in the Context of National Identity: Questions of Identity in Sixteen European Countries in the Wake of the Financial Crisis*, Oxford: Oxford University Press, 2016, pp. 1 and 12.

[132] This paragraph owes it argument to E. SHILS, *Tradition*, in *Comparative Studies in Society and History*, 1971, p. 122.

[133] This sacralisation can in turn generate animosity when we dislike where we are.

[134] E. SHILS, *Tradition*, cit., p. 130.

institution or person to exercise authority over individuals and tell them what to do, e.g. how to cook, light the house or drive on one's own property. As a consequence, the norms and codes surrounding these activities are laden with ambiguity and leeway. This gives individuals considerable autonomy. This autonomy is, moreover, not de-anchored but firmed embedded in the familiar and the individual's own sense of character and personal narrative. How one cooks, drives etc. goes both to a sense of who one is and one's own sense of manners. The autonomy is one to make comfortable choices and often not make choices at all but simply observe routines unreflectively.

The press reportage of kitchen gloves, banned gloves and motor car insurance acquires resonance and generates a demand from readers in part because it references back to what is treasured in civil identities, their sense of experience, narrative and relationship with the past, and partly because it suggests their precariousness, something of which citizens will be aware in a time of technological and economic change. It is exemplified well in a story run by the *Frankfurter Allgemeine* in October 2013, on EU plans to put maximum wattage limits on electrical appliances for ecological reasons with some limits being placed in 2014 and others in 2017. It observed the possible implications of this for vacuum cleaning.

> "Housewives and husbands will have to retrain. Up to now, people knew that any reasonably reliable dust sucker was analogous to the horsepower of the car, the higher the wattage, the higher the suction power. Now, will everyone who picks up the 'green A' [the mark for the new ecologically friendly vacuum cleaners] be forced in future to go three to four times under the breakfast table to ensure that every crumb is picked up?".[135]

However, conflicts about civil identities are present not just at the micro-level when individual EU laws encroach on a particular dimension of them. They are also present in more general contestation about EU law.

This is nowhere more evident than that in that most contested of fields, free movement of EU citizens. If mobility can have significant and unpredictable redistributive effects,[136] economic explanations for its contestation hold limited sway. Fears of labour market competition exercise only weak effects whilst concerns about public finances exercise a stronger but still very uneven influence. Two cultural arguments have, by contrast, a more powerful hold.[137] One goes to how migration is perceived to destabilise existing hierarchies, status, patterns of activity and traditions within citizens' daily lives. The other goes to how migration might affect the nation or economy as a whole. These argu-

[135] H. KAFSACK, *EU verbietet energiehungrige Staubsauger*, in *FAZ*, 24 October 2013, www.faz.net.

[136] R. DANCYGIER, S. WALTER, *Globalization, Labor Market Risks and Class Cleavages*, in P. BERAMENDI *et al.* (eds), *The Politics of Advanced Capitalism*, Cambridge: Cambridge University Press, 2015.

[137] This may well be because there are, on the whole not huge. On effects of EU migration on wages in the United Kingdom see S. NICKELL, J. SALAHEEN, *The Impact of Immigration on Occupational Wages: Evidence from Britain*, in *Bank of England Staff Working Paper 574*, London, 2015.

ments, of course, represent the two dimensions of civil identity where grand ideas of "them" and "us" are linked to the habitual and the local.[138] Narratives of intrusion, dislocation of the familiar past and an erosion of local inhabitants' own sense of authenticity have a hold here just as much they do over motor vehicle insurance and kitchen gloves. They come to form part of a continuum of threat. If these identities can carry racist and snobbish idealisations as to how the nation, economy and the habitual ought to be, key is the proximity of this destabilisation to the citizen's own sense of status and routine. Whilst hostility to migration is greatest amongst low-skill nationals of a State, it is also the case that there can be hostility towards high skill EU migrants by a State's own high skill nationals. This appears most pronounced where the former are perceived as threatening elite traditions, opportunities or sense of cultural superior within their own society.[139]

This civil identity also contributes to explaining why some citizens believe in the EU. If it is a truism that those benefitting from mobility are more likely to support the EU,[140] there is the paradox that increased mobility has coincided with declining support for the Union. More nuanced accounts have observed, therefore, that mobility per se is unlikely to generate support, particularly if it is occasional, fleeting or unpredictable. Mobility generates a EU civil identity when it feeds a citizen's sense of status, routine and sense of the familiar.[141] This can be where her own movement between States fosters this, but it can also be when movement to her local environment, as is the case with large metropoles, generates a sense of status about this environment and her place within that environment, and comes to be seen as part of the fabric of that environment.

*The ahistorical authoritarianism of EU Law.*

If the previous subsection explains the value of what is being threatened by EU law, there is still the question of why EU law is seen as both a particular threat to these identities and a perennial one. It is not simply that it encroaches on activities which go to making up these identities. It confounds and challenges those two elements which make holders value them, their relationship with the past and their authoritative ambiguity.

EU law has strong ahistorical qualities in the sense that no powerful human narrative accompanies it.[142] National laws can rely on national histories with their myths, tales of

[138] J. HEINMUELLER, M. HISCOX, *Attitudes toward Highly Skilled and Low-skilled Immigration: Evidence from a Survey Experiment*, in *American Political Science Review*, 2010, pp. 61 and 79-80; M. HELBLING, H.-P. KRIESI, *Why Citizens Prefer High-over Low-skilled Immigrants. Labor Market Competition, Welfare State, and Deservingness*, in *European Sociological Review*, 2014, p. 595.

[139] M. HELBLING, *Why Swiss-Germans Dislike Germans: Opposition to Culturally Similar and Highly Skilled Immigrants*, in *European Societies*, 2011, p. 5.

[140] N. FLIGSTEIN, A. POLYAKOVA, W. SANDHOLTZ, *European Integration, Nationalism and European Identity*, in *Journal of Common Market Studies*, 2012, p. 106.

[141] T. KUHN, *Experiencing European Integration: Transnational Lives and European Identity*, Oxford: Oxford University Press, 2015, pp. 127-143.

[142] Gasché argues that Europe must have a distinctive identity which has both a referential dimension in that it must refer back to independent phenomena which provide a heritage for it, and a figurative

passage and tales of sacrifice. They create a sacred past and daily activities can be tied back to this by those who want. There is simply no parallel EU history. The history of the EU is an institutional and legal one. One cannot point to an accompanying cultural, social or economic history. EU law acquires dislocating qualities as a result. It sits at odds with the familiarity, tradition and routine of the activities which it is regulating. It is not simply that it causes disruption and cost, but it also generates unfamiliarity and an absence of fit.[143]

EU law also robs the codes governing these activities of their ambiguity. Legislation setting out the safety of oven gloves, the balance of risks of driving on private land or the degree of ecological quality which must be exercised within a home prescribes, in all cases, the standard of conduct which must be observed. Such legislation is ideological in the sense in that it claims a monopoly of authority over what should be done and then a single way over how it should be done.[144] It negates the authoritative qualities of this civil identity as it has scant regard for conflicting beliefs, practices or things of value which might disturbed or displaced. It also appears relatively unlimited. It intrudes into areas of familiarity, security and personal autonomy. As a consequence, EU law becomes associated with legalisation and politicisation. Legalisation happens because it subjects citizens to formal commands where they presumed ambiguity. To be sure, many of these activities were not law-free zones, but these laws had, in many cases, simply become part of the habits of daily lives so that the lamps or gloves used were not analysed in terms of the standards used. Politicisation occurs because these EU laws forces citizen to decide whether they are for or against them with the consequence that political contestability now takes place over arenas through to be relatively politics free.

EU law's relationship to these identities also explains why certain EU legal conflicts do not occur. The dispute about holiday pay rates, it will be remembered, generated significant debate but was not framed as an EU law conflict. It did not regulate an activity that was either unregulated or where the prior domestic regulation had taken for granted qualities. Holiday pay has been legally protected for some time. There was no discussion, consequently, of EU law intruding on workplace relations or unduly legalising or politicising them. In addition, EU law did not resolve this question authoritatively so there was only one answer. Employers moaned but they were well aware that costs

dimension which bestows it a distinctive identity that is more than a sum of its parts. The EU has neither in a resonant way. R. GASCHÉ, *Europe, or the Infinite Task: A Study of a Philosophical Concept*, Stanford: Stanford University Press, 2009, pp. 1-18.

[143] A powerful example is the requirement of good faith in the Unfair Contract Terms Directive which so that there is a significant imbalance in the contract can allow the consumer to cancel the contract. This concept, Teubner has observed, originated in German contract law and relied for its interpretation on close producer relations and powerful organised labour. These did not exist in some other States so it came across as something of an abstract and confusing concept. G. TEUBNER, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences*, in *Modern Law Review*, 1998, p. 11.

[144] On this vision of ideology see S. TURNER, *The Significance of Shils*, in *Sociological Theory*, 1999, p. 125.

could be adjusted through changing overtime rates or limiting pay increases. There were ways, therefore, of counteracting the judgment.

### V.3. The significance of EU legal conflicts: a European cultural politics of nationalism

Uncomfortable as they may be for EU institutions, these conflicts could be extremely positive. They may open a space for democratic contestation of things that would otherwise be suppressed. Contestation could lead to new types of collective actors emerging, the development of EU law and to patterns of dominance entrenched or ignored by EU law being addressed.[145] Yet this does not happen in an institutionally structured manner because the primacy of EU law entails that it cannot be formally challenged other than through reform in Brussels: an impossible threshold for most parties. There is a more significant problem. This goes to the terms of this contestation.

EU law conflicts are set out along three axes which reinforce one another.

The first is that between EU law and the civil identity focused around daily routines, statuses, and activities. EU law transgresses on these sufficiently to touch off anxieties about who I am and who we are amongst those practising these routines etc.

The second is that between European and national. EU law frames the threat to these civil identities as a EU one, and, in the eyes of many, as a European one because the strong association that many hold between the EU and the idea of Europe. This reinforces the processes of boundary formation played by such identities. These identities become framed as being part of a wider national identity with conflicts now described as that of a national identity (or identities) being threatened by a European one. The expert/non expert or authoritarianism/ambiguity divides now become those between Europe and the nation State. A popular theme in the British referendum debate concerned the possible EU restrictions on high-wattage electrical appliances, which, it was believed, had been postponed so as not to affect the result. The reportage came across as a parody of paranoia about foreign threat and resistance.[146] The *Daily Telegraph*, therefore, headlined the "EU to launch kettle and toaster crackdown after Brexit vote";[147] the *Daily Mirror* "Why new EU rules could ban your toaster and kettle by au-

[145] On this more generally G. Simmel, *Conflict and the Web of Group Affiliations*, New York: Free Press, 1969, transl. R. Bendix, pp. 17-28.

[146] For a more considered discussion see L. O'Brien, *First They Came for the Vacuum Cleaners: Will It Be Kettles Next?*, in *Full Fact*, 21 June 2016, fullfact.org.

[147] M. Holehouse, *EU to Launch Kettle and Toaster Crackdown After Brexit Vote*, in *The Telegraph*, 11 May 2016, www.telegraph.co.uk.

tumn";[148] and the *Daily Mail* "Brexit threat saves our super-fast kettles: Brussels shelves ban on powerful appliances after British negotiators warn it could sway referendum".[149]

The third is that between EU law and a vision of collective freedom. It was pointed out earlier that the development of EU law relies on a vision of well-being which derives from participation in shared or common activities. This sets in train in a narrative in which local identities are characterised as opposing forms of association. These identities are set out, therefore, not as political communities whose value lies in a productive interaction between associations based on shared activities and associations based on co-presence. Instead, their predominant value lies in constituting a shared and common way of being. This is to be insulated off from the vision presented by EU law rather than interact with it. To be sure, therefore, putting on a kettle, cooking, driving may all be activities, and often these will be done with others, but the value ascribed to these is not the activity itself but because it represents a perceived state: be this a way of life, personal autonomy or a state of collective freedom.

This vision of community is present at every level of debate. At the micro-level, the idea is invariably one of the EU interfering with a prevailing state of freedom. This was present in the *Frankfurter Allgemeine* quote cited early on proposed wattage limits for vacuum cleaners. One can find it in many newspaper reports. The *Daily Mail* began a report in 2014 on the impending *Vnuk* judgment which was to extend compulsory insurance for vehicles in the following way: "There are few things Britons take greater pride in than a well-trimmed swathe of lustrous lawn. But caring for your treasured turf could be about to become much more expensive – thanks to a ruling from (you guessed it) Europe".[150]

At the meso-level, it has led to a particular vision of national community. Polyakova and Fligstein have, therefore, argued that the significant growth in the number of EU citizens who saw themselves in exclusively national terms during the financial crisis irrespective of context or the type of debate in which they were engaged occurred most strongly in those States where the EU was seen most dramatically an engine of change and instability.[151] Citizens did not trust national institutions more strongly in those States, however. The debate was therefore not about which institution or law could do a better job. It fell back, instead on the image of the nation as a prior State.

The political morality of this singular narrative of co-presence has an equally impoverished and distorted vocabulary to that of a political community based exclusively

[148] R. Sayid, *Why New EU Rules Could Ban Your Toaster and Kettle by Autumn*, in *Mirror*, 11 May 2016, www.mirror.co.uk.

[149] T. Cohen, *Brexit Threat Saves Our Super-fast Kettles: Brussels Shelves Ban on Powerful Appliances After British Negotiators Warn It Could Sway Referendum*, in *Daily Mail*, 27 February 2016, www.dailymail.co.uk.

[150] B. Carlin, *Now Brussels Threatens to Slap Car Insurance on Your Lawnmower: Move Could Cost Gardeners at Least £100 a Year*, in *Daily Mail*, 2 August 2014.

[151] A. Polyakova, N. Fligstein, *Is European Integration Causing Europe to Become More Nationalist? Evidence from the 2007–9 Financial Crisis*, in *Journal of European Public Policy*, 2016, p. 60.

around shared activities. It sets out a representation of what people should feel because of the enactment or application of particular EU laws. In reality, some may be bothered by EU laws, others unfazed or others simply untouched. A good example was the *Vnuk* judgment. Very few citizens in the EU own golf buggies or lawnmowers which could be driven, the two central vehicles touched by the new insurance requirements. Almost everybody was untouched by it.

A lexicon of common sense is provided as to what citizens should feel about EU law and its effects on their lives.

It is a common *sense* in that it does not appeal to their reason, reflection or cognition but rather to their feelings and senses. Tendentious language such as "bonkers" or "barmy" is used to describe the qualities of EU laws. Imagery, be it of kitchen tables, housewives or perfects lawns, is used in the place of analysis. This serves as a colourful antidote to the functionalism and instrumentalism of EU law but carries its own dangers. Such language can mask the authenticity of what is taking place, and whether feelings are actually being disoriented or displaced. It also sacralises these activities and identities. They become immune from judgment as they acquire a value in themselves independently of what they actually do. Traditions, rituals, roles are perpetuated by such language irrespective of the abuse and damage that they may do.

It also sets out a *common* sense in two ways. It does this, first, by expressing not merely a collective judgment about EU law but also a shared template as to how to respond. In this, it sets out an aesthetic for how citizens are to react to EU law. They are to judge it bonkers, barmy, interfering or intrusive. A quality of judgment is provided which it would be considered deviant to depart from.[152] In the British referendum, therefore, experts were frequently attacked as biased,[153] suffering from group-think[154] or in the pay of Brussels.[155] For that to be suggested, irrespective of the expertise offered in support of the expert's argument, a characterisation had to be made that an argument supporting or even agnostic about EU law departed so far from common sense that it put into question the expert's judgment.[156] Secondly, and even more problematically, in

[152] This idea of a shared sensibility which is to inform judgment which is then to inform reason is not new. It can be traced back to the origins of the Enlightenment, J. HESS, *Reconstituting the Body Politic: Enlightenment, Public Culture and the Invention of Aesthetic Autonomy,* Detroit: Wayne State University Press, 1999, pp. 155-180.

[153] P. INMAN, *Bank of England Governor Rejects Accusations of Bias Over EU Referendum*, in *The Guardian*, 24 May 2016, www.theguardian.com.

[154] R. BOOTLE, *Economic Arguments about Brexit Have Succumbed to Group-Think*, in *Telegraph*, 5 June 2016, www.telegraph.co.uk.

[155] D. MATTHEWS, *EU-funded Professors Deny Claims of Bias from Brexit Campaigners*, 31 May 2016, www.timeshighereducation.com.

[156] An example was the reaction to the research showing the positive fiscal effects of EU migration, C. DUSTMANN, T. FRATTINI, *The Fiscal Effects of Immigration to the UK*, in *Economic Journal*, 2014, p. 563. The piece has appeared in a peer-reviewed journal ranked 19 for Economics in the world. However, that did

many instances it is argued in some limited instances that a common sensibility is being attacked. An EU law requiring insurance of golf buggies is not just bothersome for owners of these but is rather an attack on national freedom more generally. The domestic law or activity is seen as an inextricable part of a collective freedom in which an attack on the former is equally an attack on the latter.

An extreme example is to be found in a particularly repugnant piece entitled "Europe destroying the foundations of our way of life". The *Daily Express* newspaper, after admitting that a Hungarian dance troupe were worthy winners of a British show *Britain's Got Talent*, stated:

> "The Hungarian troupe were able to compete on British television for precisely the same reason that we have lost control of immigration, criminal justice and welfare under our subjugation to Brussels and Strasbourg.
> The European system that demands the participation by Attraction in Britain's Got Talent is also the system that prevents the deportation of Islamic extremist Abu Qatada or insists that we dish out benefits to jobless Romanians.
> One Hungarian dance troupe might seem utterly insignificant but in truth the entire demography of our country has been transformed by EU's determination to smash our border controls".[157]

It is also expressed in more pervasive ways. EU health and safety proposals for hairdressers were criticised in a 2012 *Sun* newspaper article not just for restricting the way hairdressers want to express and market themselves, but also for the strangulation of thousands businesses and the imposition of regulatory costs of 80 billion GBP per annum, notwithstanding that top estimates of the costs were three million GBP per annum and there was nothing on what clothes should be worn.[158] A relatively restricted proposal was, thus, presented as a devastating a national economy and culture.

## VI. Conclusion

The picture presented by EU legal power is, thus, an ugly one. The dominant imaginary for the EU is one of over-responsibilisation, disorientation and alienation. The reportage of conflicts about EU law adds further sensations. Citizens are forced to make binary choices between the world of *Wissenschaft* and the world of *Kenntnis*, the world as it is

not stop the relevant (Euro-sceptic) minister Iain Duncan Smith describing its approach as "silly" because "you don't account for the fact that often in many communities they literally change the schooling because so many people arrive not speaking English. You have then got problems you know with local services, transport all that kind of stuff". See R. Mason, *Immigration Is Changing Character of UK Schools, Claims Iain Duncan Smith*, in *The Guardian*, 17 November 2014, www.theguardian.com.

[157] L. Mckinstry, *Europe Destroying the Foundations of Our Way of Life*, in *Express*, 10 June 2013, www.express.co.uk.

[158] T. Newton Dunn, *Hair Hitlers*, in *The Sun*, 9 April 2012, www.thesun.co.uk.

conceived and intellectualised for them and the world as it is perceived by them and with which they are acquainted. They are required to engage, unnecessarily, with the question of whether valued daily routines, activities and roles are just that or whether holding on them is a sign of defensiveness and intolerance to be exploited by those who want a return to a world of aggressive nationalist politics. The surprise is not the level of opposition to the EU but rather the level of support for it.

This is what happens when the language of constitutionalism and checks and balances is dedicated to a process of European system building rather than to structuring legal and institutional power. It is all the more unnecessary because a plausible case can be made for most of the EU's policies.[159] At the heart of these difficulties, it is suggested, is a lack of thought about both the quality of the relationships established by EU law and the quality of the relationships dislocated by EU law. There is no quick institutional solution. These qualities are endemic to EU law as no institution has a monopoly over the resolution of EU legal conflicts, no expectation can be made that it can be resolved by any single institution.

The best aspiration is that EU law can begin to embody an *ethos* which values these relationships appropriately. Such an *ethos* would involve a new European law of attachments. At its heart, this law would be characterised by an *ethos* in which preeminent value is granted to solidarities generated by EU law, on the one hand, and the attachments of daily life, on the other, with mutual respect for the dominant norm governing their interaction. Such a law would be a complicated affair as it would have to discern between those relationships which contribute to or enlarge our sense of Self and false impostors, such as market dependencies, and it would also have to address what to do when these relationships conflict. Such a debate would still, however, be a more honest and grounded debate than the current ones about what the EU should do next. Setting out its parameters is beyond the scope of this piece, however, and awaits another day!

[159] On two controversial issues, there is thus strong citizen support. Over two thirds of EU citizens want a common European immigration policy and support for a free trade agreement with the United States is over fifty per cent higher than opposition to it, European Commission, *Public Opinion in the European Union: Autumn 2015,* cit., pp. 29 and 31.